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In The

Supreme Court of the United States

October Term, 1984

PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON, *Petitioner,*

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, ET AL., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE YAKIMA INDIAN NATION, NATIONAL WILDLIFE FEDERATION, AND STATE OF WASHINGTON DEPARTMENTS OF FISHERIES AND GAME IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals decision bars the use of "reopener clauses" in hydropower licenses that provide the Federal Energy Regulatory Commission post-licensing authority to impose reasonable modifications of hydropower projects' structures or operations.

2. Whether the Federal Energy Regulatory Commission was required by the National Environmental Policy Act to prepare an environmental impact statement in connection with its grant of a new 40-year hydropower license for an existing dam, where it was undisputed that the dam significantly affects the human environment and where relicensing provisions of the Federal Power Act require a de novo evaluation of the project's harms and benefits and a review of alternatives to unaltered project operation before issuance of a new license.

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STATEMENT

A. Background Of The Case And The License Decision.

Rock Island Dam, licensed by the Federal Power Commission[1] in 1930, was the first major hydroelectric project constructed on the Columbia River. Located near the town of Wenatchee, Washington, the dam sits athwart a major migration route for spring and summer chinook salmon, coho and sockeye salmon, and steelhead trout. Above the dam are major tributaries, providing natural sprawning and rearing for those species of anadromous fish, as well as three federal fish hatcheries. Upper Columbia populations of salmon and steelhead have historically supported commercial, recreational and tribal fisheries.

Anadromous fish hatch in fresh water, migrate downstream to the ocean and then return eventually to their natal stream to spawn and die. As a consequence, fish from the upper reaches of the Columbia River must pass the Rock Island Dam — and six to eight other hydroelectric projects — twice, once as juveniles and again as returning adults. On each trip, the fish suffer significant injury and mortality at the dams. In the fifty-five years since Rock Island received its original license, the massive hydroelectric development of the Columbia River system has severely depleted the fisheries of the Columbia River.

Rock Island Dam has fish ladders and related facilities which, although not perfect, assist adult fish in their voyage upstream. Since 1930, however, there have been no

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[1]The duties of the FPC were assumed by the Federal Energy Regulatory Commission (FERC) in 1978. 42 U.S.C. § 7172.

comparable passage facilities to assist juvenile fish past the dam on their downstream migration. Under such circumstances juvenile fish must either pass in water spilled over the top of the dam or travel through the power turbines where sizeable numbers are killed.

In 1973, Public Utility District No. 1 of Chelan County, ("Chelan"), which operates Rock Island, applied for a major license amendment for the dam to increase its power production substantially by adding a second powerhouse to the project. Such an increase would necessarily and has, in fact, resulted in much greater proportions of the river's flow passing through turbines and a much smaller percentage being spilled as a matter of course. At the time of the application, fisheries agencies requested that a structural bypass system to permit juvenile migrant fish to pass the dam without going through the turbines be incorporated into the design of the project. The Federal Energy Regulatory Commission ("FERC" or "Commission") denied those requests. Instead of incorporating fish passage facilities at the new second powerhouse, it permitted the construction of the project while deferring protection measures until further studies were completed. *See, Public Utility District No. 1 of Chelan County*, Order Amending License (March 29, 1974), 51 F.P.C. 1141, Pet. App. 80a. The Commission prepared an environmental impact statement in 1974 on the construction of the second powerhouse which, however, did not consider the impacts of the older first powerhouse. Moreover, since the agency deferred the major questions of downstream fish passage for further study, the EIS did not incorporate any serious review of alternative fish passage or fish protection mea-

sures. Nor did the 1974 license amendment include any requirement for spills for downstream fish passage.[2]

In January 1977, in anticipation of its original license expiring in 1980, Chelan filed an application for new major license for the entire Rock Island Dam, both the old "first" and new "second" powerhouses. In their intervention papers and comments, fisheries agencies asked for the implementation of a number of measures to better protect juvenile fish at the dam. There was no hearing on those requests or on Chelan's application. There was no consultation, other than a formal request for comments, between FERC and the fish agencies and tribes on Chelan's application.

In May 1981, the Director of the Office of Electric Power Regulation, using authority delegated to him by the Commission, issued a new major 40-year license for the Rock Island Dam. The new license did not incorporate any downstream fish protection terms, including terms of the

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[2]Chelan's suggestions that the second powerhouse at Rock Island Dam has downstream migration fish protection measures is misleading, if not worse. Its statement that the kind of "bulb" turbines at the second powerhouse kill far fewer fish than traditional "kaplan" turbines, is disputed by experts in the fisheries agencies. The uncontradicted affidavit of a federal fish biologist in the record before FERC suggests that mortality could range from 10 to 30 percent of fish passing through the turbines. J. App. 269-70. Chelan's reference to a structural fish bypass system is similarly inaccurate. Chelan well knows that the so-called bypass system refers simply to a conduit from the gatewell on the upstream side of the dam to a pipe outlet at the downstream side. There is no facility to guide or collect fish. The conduit serves only to salvage fish which have become trapped in the gatewell and is not considered a fish bypass system by the experts.

so-called Mid-Columbia settlement, discussed *infra*.[3] There were no spills required in the new license. There were no specific stream flows required in the new license. There were no downstream fish bypass facilities required in the new license.[4] The new license merely included standard clauses reserving the Commission's authority (but not the duty) to prescribe flow releases, Article 12, Pet. App. 48(a), and to require "reasonable modifications of the pro-

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[3]See, Order Issuing New License, Pet. App. 23a-58a. FERC's statement to the contrary, FERC Brief at 4, is flatly wrong. It made the same false claim to the Ninth Circuit, which itself erred in assuming that at least the minimum flow provisions of the Mid-Columbia agreement were incorporated into the new license. Pet. App. 13a. A review of the license shows that not to be the case. In any case, the settlement expired in March 1984, but the license lasts until 2020.

[4]The Director did make certain minor changes in the license on nonfish issues. For instance, the Director added or amended Articles 3, 5 and 44, which give the utility authority to convey certain project lands. Article 44 adds detail, but little of substance, to previous licenses. Article 29 of the original Rock Island license required that the licensee retain ownership of the project area. Original Article 31 permitted the Commission to alter the license with the licensee's consent. Presumably, if the utility wished to dispose of part of the project area, it would give its "consent" and the sale could be arranged with a change in the license. New Article 39 deals with archeological and historic sites. That Article does two startlingly unimportant things. First, it enjoins Chelan to "continue [its activities] . . . as required by the prior license." J.A. 118. Second, it requires archeological work "prior to the commencement of any construction or development." But since, as Chelan and FERC note, the license anticipates no new construction, the Article is simply irrelevant. FERC and Chelan make much of these changes, suggesting their expeditious implementation helped justify licensing without fish protection measures. Even if that were legal, however, the new articles add little or nothing of substance, as compared to the important fish issues left unresolved. FERC's purported concern for non-fish values at Rock Island is commendable, but trivial.

ject structures and operation . . . after the notice and opportunity for hearing'' for the conservation and development of fish and wildlife resources. Article 15, Pet. App. 50(a). Article 38 of the new license reiterated the 1974 license amendment in calling for additional studies of fish and wildlife needs, but extended the deadline of the crucial Exhibit S (a fish and wildlife plan required by regulation to be filed *at the time of application*, 18 C.F.R. § 4.41 (1976)), until May 1984. Pet. App. 34(a). The Director explained his failure to impose any conditions to improve the passage of downstream migrating fish at Rock Island by saying that the needs of fisheries were being studied in the separate license modification proceeding dealing with five Columbia River dams, including Rock Island — the so-called Mid-Columbia proceeding. *See*, discussion, *infra*.

No EIS accompanied the issuance of the new major license for Rock Island Dam. The Director justified the failure to prepare an EIS on the grounds that the new license did not change existing project operations.

The National Marine Fisheries Service and the Yakima Indian Nation, joined by the National Wildlife Federation, appealed the Director's decision to the full Commission. In those appeals, and in subsequent requests for rehearing, the agencies and tribes requested specific fish protection measures and asked that a full evidentiary hearing be called if necessary to enable them to define the details of those measures. Also attached to the petition for rehearing were uncontested affidavits from biologists working for the National Marine Fisheries Service showing that significant fish mortalities continued at the Rock Island Dam. The biologists also explained that license conditions to protect fish could be established with then available

data. The Commission rejected the appeals and the subsequent requests for rehearing, relying on the existence of the so-called Mid-Columbia proceeding to "address the concerns" of the fish agencies. It expressed a desire to wait for a full record to be certified to it from the Mid-Columbia proceeding, but ignored the record made in the relicensing proceeding itself by the agencies documenting the problem and suggesting solutions. It also ignored the fish interests' willingness and desire to go to hearing on the relicense order to supplement that record if the Commission felt it necessary. FERC reiterated and made more clear the Director's justification for failure to prepare an EIS when it said that since the new license did not change the status quo (that is, the dam still existed and continued to operate in essentially the same manner), no EIS was required.[5]

B. The Mid-Columbia Proceeding.

Rock Island Dam is one of five non-federal projects in that part of the Columbia basin known as the Mid-

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[5]The Commission argues for the first time in its brief before this Court that it did consider the fishery issues at Rock Island in light of the "best available data," at the time—the Mid-Columbia settlement. FERC Brief at 18-19. The record of the decision to issue the license shows exactly the contrary, and for that reason the Ninth Circuit found it "undisputed" that FERC did not study fishery impacts and mitigation alternatives at the project. Pet. App. 10a. The settlement, of course, is not data, but rather a temporary compromise that called for "studies" to gather data. And, even if its terms were the best proposals then available, FERC did not incorporate the settlement into the license and the agreement has since lapsed. Moreover, the Commission ignored the uncontradicted affidavits of agency fish biologists announcing that there was information available on which substantive fish protection measures could be based without further study.

Columbia.[6] In 1976, the Washington Departments of Fisheries and Game moved FERC to improve flows for fish at one of those projects, the Priest Rapids Dam. In 1978, Washington joined with other state and federal fisheries agencies and the Yakima Indian Nation asking for license modifications for all five dams, including Rock Island, to improve flows and spills for fish passage. The licensees, including Chelan, opposed this request, arguing that the Commission was without authority under "reopener clauses" to modify licenses without licensee consent. Pet. App. 111a, *see,* further discussion of Chelan's response, fn. 11, *infra.*

In March 1979, the Commission consolidated the 1976 and 1978 requests in a single proceeding, the "Mid-Columbia" proceeding. The Commission did not consolidate the Rock Island relicensing proceeding with the Mid-Columbia process. The Mid-Columbia proceeding was, to the contrary, only to consider, under "reasonable modification" clauses in preexisting licenses, "the ways, if any, in which the operations of [the] Projects . . . should be modified . . ." to protect anadromous fish "for the remainder of [existing] license terms." Order Consolidating Proceeding, Pet. App. 110a, 114a, 119a.

In March 1980, the parties to the Mid-Columbia Proceeding signed a settlement calling for a five year study program to investigate the impacts of the projects and means to improve fish passage and production. The agreement also provided some small increases in spill and hatchery production. The settlement was plagued by differences between the parties and in 1981 the fish agencies

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[6]FERC states incorrectly that there are six projects.

moved to set it aside. Since then, although the agreement was not rescinded, project operations have been arranged through annual stipulation. *See*, Administrative Law Judge Report to the Commission on Status of Proceeding (March 17, 1983). The agreement itself expired in March 1984.[7]

At the time the Court of Appeals acted, and still today, there was no schedule for, or hearings set to determine a schedule for long-term resolution of fish issues at Rock Island Dam. There are no further studies planned for Rock Island Dam under the aegis of that proceeding.[8]

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[7]FERC asserts that there are currently hearings being conducted to determine fish protection measures at the Mid-Columbia Dams and that the parties have agreed on measures for improved fish protection. FERC Brief at Note 1. In fact, the only hearings scheduled—and, contrary to FERC's statements, these are the first formal hearings ever held in the Mid-Columbia proceeding—are to address the limited question of how to operate Rock Island Dam in 1986 and 1987.

In 1984, Chelan PUD and the other parties to the proceeding could not reach agreement on how to operate Rock Island Dam in 1985, on or what, if any, studies should proceed at that project. (Chelan opposed all additional studies of bypass systems and levels of spill effectiveness.) The Administrative Law Judge set the 1985 spill at Rock Island at the level proposed by Chelan and considered inadequate by the fishery interests. He also established a schedule for hearings on what interim fish protection measures should be taken at Rock Island Dam—for 1986-1987 only. Order Directing Flow Regime, Establishing Further Procedures, and Phasing Case (November 21, 1984). The Judge refused agency requests to clarify how the relicensing issues at Rock Island Dam related to the 1985 hearing on the grounds that he was without jurisdiction on relicensing matters because the Commission had not consolidated them with the Mid-Columbia Proceeding. Order on Motion for Clarification (December 6, 1984).

[8]There is no basis, therefore, for FERC's description of the Mid-Columbia proceeding, especially as relates to Rock Island Dam, as an "ongoing comprehensive study of all fishery-related issues," FERC Brief at i, or as a "projected 10-year study." FERC Brief at 19.

C. The Court Of Appeals Decision.

The Court of Appeals found that in granting a new license to Rock Island Dam prior to considering and resolving controverted fish protection issues FERC violated a number of its statutory and regulatory obligations. The court determined that in relicensing hydropower projects under Section 15 of the Federal Power Act (FPA), 16 U.S.C. § 808, the Commission must conduct the same careful assessment of impacts and alternatives as for an original license under Section 10 of that law. 16 U.S.C. § 803. The court found, in addition, that the obligations imposed by Section 10 were "well defined." "FERC must consider fishery issues *before,* not after, issuance of a license." Pet. App. 10a. Since it was "undisputed" that FERC had not conducted a careful review of fish issues, but had, instead, deferred all such questions to some future analysis in the Mid-Columbia proceeding, the court concluded that FERC had violated the FPA.

The court also found that the deferral of fish issues violated the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (requiring that fish and wildlife be given "equal consideration" to power production) and the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(h)(11)(A) (requiring that fish and wildlife receive "equitable treatment" with power production). Pet. App. 14a-15a.[9] In addition, the court deter-

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[9]FERC suggests that a reversal of the court of appeals on the FPA issue would automatically invalidate the holding based on these two statutes as well. That is clearly not the case. As the Court of Appeals noted, the Coordination Act and Northwest Power Act "place additional mandates on the Commission in a relicensing proceeding." Pet. App. 14a. Thus, even if the Commission's action in deferring fish issues was legal under the FPA, it is still proscribed under these additional statutes.

mined that FERC violated its own rules 18 C.F.R. § 4.41 (1976), when it failed to require Chelan to submit an Exhibit S (a fish and wildlife report) *prior* to licensing. Pet. App. 15a-18a.

Finally, the court declared that FERC violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, when it issued a new license without preparation of an EIS. It rejected the argument that the relicense was no "more than a phase in continuous activity." Pet. App. 20a. Instead, it noted that in a relicense proceeding the Commission is obligated under the FPA to fully canvas the impacts of, and alternatives to, continued operation of a project under previous license conditions. Since "relicensing . . . is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo," Pet. App. 21a, and since no one disputed that the Rock Island Dam significantly affects the quality of the human environment, Pet. App. 18a-19a, the court of appeals found an EIS should have been prepared *before* the license was issued.

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ARGUMENT

This Court grants review on writ of certiorari "only when there are special and important reasons." Sup. Ct. R. 17. This case does not present circumstances justifying a writ. There is no conflict between the Ninth Circuit's holding and that of other Circuits. Nor do the questions of federal law decided by the Ninth Circuit require review by this Court.

I. The Court Properly Interpreted The Federal Power Act.

A. Chelan And FERC Misconstrue What The Court Of Appeals Held And Improperly Seek Review Of An Issue Not Decided Below.

FERC is authorized by § 10 of the Federal Power Act (FPA) to issue licenses to hydropower projects on or affecting navigable waters of the United States. 16 U.S.C. § 803(a). Such licenses may only be issued after a full public interest review and after FERC canvasses all reasonable project alternatives and their environmental impacts. *Udall v. FPC,* 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference v. FPC,* 354 U.S. 941, (2d Cir. 1965), *cert. denied,* 384 F.2d 941 (1966). A decision to relicense a project, that is, to issue a new major license under Section 15 of the FPA, 16 U.S.C. § 808, requires a similar review. As the court of appeals said, in issuing a relicense FERC must "reevaluate the best use of . . . [the] project . . . in light of contemporary and prospective public needs," Pet. App. 21a, quoting H.R. Rep. No. 1643, 90th Cong., 2d Sess., reprinted ir 1968 U.S. Code Cong. & Ad. News, 3081, 3086, and in the same manner and care as it would an initial license. *Id.* at 3084.[10]

In issuing the Rock Island license, FERC deferred major and critical fish protection issues indefinitely, claiming that they would be resolved after additional study in the so-called "Mid-Columbia" proceeding. It con-

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[10]FERC did not dispute the similarity of initial and relicense proceedings before the Ninth Circuit. It now hints there may be a difference, FERC Brief at n. 8, but provides no reason to question the court of appeals on this point.

cluded that it could substitute the future right, after the license was issued, to require "reasonable modifications of the project structures and operation . . . after notice and opportunity for hearing," New Major License, Article 15, Pet. App. 50a, for the broad discretion to act in the public interest it enjoys under § 10 and § 15 of the FPA, 16 U.S.C. 803, 808, prior to issuance of the license. The court of appeals held that the Commission could not meet its § 10 and § 15 obligations after the fact. It said: "The law, then, is well defined: Prior to issuance of a new license, FERC must study the effect of a project on the fishery resource and consider possible mitigative measures." Pet. App. 10a. "FERC must consider fishery issues *before* not after issuance of licenses." *Id.*

Both FERC and Chelan misconstrue what the court of appeals did and urge that this Court grant certiorari to review and reverse a conclusion the court of appeals never reached. According to FERC and Chelan, the court of appeals has read § 6 of the FPA, 16 U.S.C. § 799, to prohibit FERC from using so-called "reopener clauses" in licenses to permit future alterations in project works or operations. They then spend the bulk of their briefs disputing the propriety of that conclusion.[11]

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[11]Chelan's argument on this point is particularly ironic. When the agencies and tribes sought to alter Chelan's existing license in their petitions commencing the Mid-Columbia proceeding, Chelan argued that the "reasonable modification" language of a reopener clause significantly curtails FERC's discretion. It claimed, first, that *no* new conditions could be imposed without its consent. Answer of Chelan PUD to Motion and Petition for Modification of Project Operations. J.A. 52, 54. It also asserted that the word "reasonable" in the phrase "reasonable modifications," meant only to "elicit . . . Chelan's

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The court of appeals did not bar the use of reopener clauses. It specifically recognized and approved them. Nor was its opinion based primarily on the scope of § 6 of the FPA. The court held, rather, that under § 15 and § 10 of the FPA, FERC may not use a reopener clause to substitute for pre-license consideration of fishery issues.[12] Pet. App. 13a. The court's discussion of § 6 was subdsidiary to its main holding. Thus, the court of appeals' opinion in this case is not in conflict with any court ruling permitting the use of reopener clauses. E.g., *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78 (D.C. Cir. 1983); *California v. FPC*, 345 F.2d 917 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965). Most of what Chelan and FERC have

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cooperation," not provide blanket authority to override previously decided conditions. Application of Chelan PUD for Rehearing of Order Consolidating Proceedings, J.A. 71, 74. Finally, Chelan stressed repeatedly that § 10(a) of the Federal Power Act required the Commission to modify projects *before* they were licensed. After license approval, the board authority of § 10(a) was, Chelan said, lost. J.A. 55, 75-76. Chelan argued that, notwithstanding the reopener clause, the Commission by issuing a license had made a finding that the project, as licensed, met the public interest test of § 10(a). In any effort to reopen the license, therefore, the burden would lie with petitioners and Chelan would demand a comprehensive review of all issues implicated by the proposals through development of an EIS. J.A. 56, 76.

[12]Chelan's and FERC's misconstruction of what the court did is clearly revealed in their statements of the issue they seek to raise before this Court. Each asks whether § 6 of the FPA bars the use of reopener clauses. The court of appeals, however, held that §§ 10 and 15 required prelicensing consideration of fish issues. Moreover, it did not deny, indeed it affirmed that § 6 did not prohibit the use of reopener clauses. It merely pointed out that the right to impose license modification under a § 6 reopener, such as that found in the Rock Island license, cannot substitute for a complete prelicense review.

to say in their briefs, while it may be relevant to theoretical questions about the reach of § 6 of the FPA, nevertheless has no bearing on what the court of appeals actually did. The Court should not grant a writ to review issues never decided by the Ninth Circuit.

B. The Court of Appeals Properly Found That The Federal Power Act Requires Pre-License Review And Resolution Of Fishery Issues.

As we have explained, the FPA issues posed by Chelan and FERC in their papers (whether § 6 of the law prohibits the use of "reopener clauses" in hydropower licenses) was neither reached nor decided by the Ninth Circuit in a manner contrary to the current petitioners' position. Insofar as FERC and Chelan criticize what the court of appeals actually held, they do so primarily by indirection. But neither give any convincing basis to dispute the court's fundamental legal conclusion nor any reason why this Court should go beyond the issues actually presented by the petition for a writ and review the Ninth Circuit's decision.

Chelan suggests that the court of appeals' holding "is not supported by . . . the case authority or legislative history which it cites." Chelan Brief at 16. That bald assertion does nothing to undermine the solid analysis contained in the court of appeals' opinion, which analysis we will not repeat here. It is worth noting, however, that all the cases on § 10 of the FPA support what the Ninth Circuit did here. For instance, this Court has itself said that a license decision "can be made *only after* exploration of all issues relevant to the 'public interest' . . . ." *Udall v. FPC*, *supra*, 387 U.S. at 450 (1967) (emphasis added).

Moreover, in a companion case to one relied upon by Chelan and FERC *(Pacific Gas and Electric Co., supra)* the court of appeals for the District of Columbia Circuit interpreted the FPA and *Udall* as did the Ninth Circuit:

> [T]he Court [in Udall] . . . conveyed this message: where a project may have major adverse environmental effects, the Commission should carefully consider the need for the project, in light of its multiple impacts on commerce recreation, wilderness, and wildlife preservation, *before granting a license.*

Friends of the River v. FERC, 720 F.2d 93, 102 (D.C. Cir. 1983) (emphasis added).

The Second Circuit followed a similar approach in a case closely analogous to this one. In *Scenic Hudson Preservation Conference v. FPA, supra,* the Commission had rejected intervenors' objection to its grant of a license "while at the same time deferring . . . [its] final decision on the design of fish protection facilities." *Consolidated Edison Company of New York,* Project No. 2338, 33 FPC 965, 968 (1965). The intervenors argued, as here, that the Commission had thus "fragmentized the project and proceeded without weighing all the factors required by Section 10(a) of the Federal Power Act." *Id.* The court remanded for the Commission's failure to compile a record sufficient to support its decision, to consider all relevant factors, and to study all reasonable alternatives. It specifically found the analysis of fishery issues inadequate and said:

> [I]t is [the courts'] . . . duty to see to it that the Commission's decisions receive that careful consideration which [Section 10(a) of] the statute contemplates. [354 F.2d at 612] At the time of its original hearings, there was sufficient evidence before the Commission

> concerning the danger to fish to warrant further inquiry. [*Id.* at 623] On remand, the Commission should take the whole fisheries question into consideration *before deciding whether the Storm King project should be licensed.* [*Id.* at 624] (emphasis added).[13]

FERC and Chelan also invoke this Court's cases admonishing courts "against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 525 (1978). The court of appeals understood the teachings of those cases, however, Pet. App. 10a-11a and nothing it held conflicts with this Court's holdings. *Vermont Yankee* is no "talisman under which any agency decision is by definition unimpeachable." *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance* — U.S. —, 103 S.Ct. 2856, 2870 (1983). Rather, FERC's discretion to structure its procedures is circumscribed by its statutory duty to understand a proposed project, its impacts, and its alternatives, before it issues a license. Otherwise, it cannot comply with its substantive public interest obligations under the FPA. *Udall v. FPC*,

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[13]In short, Chelan's effort to diminish the significance of the *Scenic Hudson* decision as based solely on an evidentiary question is wide of the mark. The Ninth Circuit ruling, moreover, does not conflict in any way with the D.C. Circuit's *Swinomish Tribal Community v. FERC*, 627 F.2d 499 (D.C. Cir. 1980). There, the court of appeals permitted the Commission to conduct a separate proceeding on instream flow issues, rather than reopen a hearing already long closed. The petitioners, among other things, had failed to exhaust their administrative remedies by asking for consideration of flow issues in a request for rehearing on the license. Moreover, the request to reopen the license proceeding, which led the Commission, instead, to institute the separate flow hearing, came several years after the record was closed.

supra. The court of appeals did not impose "additional procedural requirements on [the] . . . agency" not required by statute, *Id.*, such as the special hybrid rule-making imposed by the court of appeals in *Vermont Yankee*. It simply required that FERC not commit the public water resources of the Columbia River for forty years prior to conducting any hearing, under any procedures, to assess and resolve controverted fish protection issues.

FERC also endeavors to make policy and factual arguments unconnected to the case at hand. The Commission suggests, for instance, that the reopener condition here should be an acceptable substitute to full pre-license review because "the Commission did consider the fish issues by basing its 1981 conditions on the best information then available." FERC Brief at 19. That statement can find no support in the record. The Commission did not seek to compile the best information available; indeed, it rejected requests by the fishery interests to hold a hearing for that purpose. Insofar as there is a record, it consists of undisputed fish agency affidavits proposing fish protection measures. But the Commission, even with those affidavits before it, refused to consider the fish issues at all, and deferred them totally into the future under the Mid-Columbia proceeding. Pet. App. 10a. *See*, discussion, fn 5, *supra*. On the critical questions of flows, spills, and and juvenile fish passage, there are *no* "1981 conditions." The license nowhere incorporates even the minimal provisions of the now expired Mid-Columbia settlement. *See*, fn. 3, *supra*. FERC had before it "sufficient evidence . . . concerning the danger to fish to warrant further inquiry," *Scenic Hudson*, 354 F.2d 612, and the Commission so ad-

mits. Yet, it granted a license without any such inquiry. That is the legal violation here.

FERC also urges that the court of appeals opinion will hamper its administration of the FPA. It suggests that in certain circumstances when licensing *new* projects it may only be able to impose appropriate license conditions after studying the actual operation of a project, after it is licensed and built. FERC Brief at 20. Such circumstances are not before the Court. Here, even if further study of the Rock Island Project were required to make an adequate record to impose fish conditions (a position the fisheries interests disputed in their affidavits), the Commission had a simple choice. It need not have issued a new license; it could have studied the project's operation under annual licenses, and then based its licensing decision on the results of those studies.

Moreover, the assertion that the Commission will face a Hobson's Choice between "impos[ing] conditions based on theoretical guesswork without the best available data . . . or not issu[ing] a license at all," FERC at 20, has no applicability to the Rock Island case. The Commission could have delayed issuing a new forty-year license to the project pending a hearing, and power production would have continued. Moreover, the fish agencies believed — and so stated in their uncontradicted affidavits—that information was available to support reasonable fish measures as license conditions. The Commission refused even to hold a hearing to investigate the information the agencies offered. Finally, the Commission's assertions that it needs to build projects in order to study them, while irrelevant to this case both on legal as well as factual grounds, is also of dubious value as a matter of policy. Post-license

monitoring to fine-tune fish protection measures is always wise. But it is difficult to credit the assertion that, with the sophistication of scientific analysis now available, the Commission cannot, after a full hearing, develop conditions for any license issued that impose basic fish protection measures and responsibilities.

While reopener clauses are undoubtedly useful license provisions, the court of appeals was not incorrect in finding, at least in the form granted to Chelan, that such provisions cannot be expected, either legally or practically, to substitute for thorough prelicense review and license conditions. At the licensing stage, the Commission has very wide authority to "require the modification of any project and of the [project] plans and specifications. . . ." 16 U.S.C. § 803(a). Under a reopener clause, the Commission can only require "reasonable modifications of the project structures and operation . . . ." Pet. App. 50a. Moreover, at licensing, the applicant bears the burden of demonstrating that its project can pass the public interest standards of the FPA, and other relevant statutes, including fish and wildlife protection. 5 U.S.C. § 556(d). After licensing, the burden shifts to the Commission (or others) if they want to change the license. At licensing, the Commission can at least consider a nonpower or partial nonpower license where fish protection should be paramount. 16 U.S.C. § 808. Once a power license is issued, that option disappears.

Far from being necessary or advantageous, the Commission's process of permitting the construction of dams and studying their impacts later is likely, instead, to have very serious adverse practical consequences. First, as the court of appeals noted, such an approach gives the licensee

no incentive to act swiftly to install fish facilities. It creates a very real incentive to delay additional, perhaps costly, structures indefinitely. Second, a license order creates a new "status quo" against which fish protection measures are to be judged. What may be a straightforward construction task before major structures are in place could prove more difficult and costly if undertaken later and if not designed into the major structure to begin with.[14] A license without fish conditions may well foreclose reasonable options, not only construction options for a particular project, but radically different alternatives such as different location or placement of a project or the denial outright of a project license. While FERC may assume that fish protection can be achieved after study, it could turn out that a project is simply incompatible with a healthy fishery. If that were true, it would only be discovered, under the Commission's power first/fish last approach, after concrete has been poured and it is too late to prevent the damage. Indeed, it is this very approach — building dams and studying fish later — that has brought some of the once magnificant salmon runs on the Columbia River near to the point of extinction.[15]

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[14]This is exactly why the fish agencies requested the integration of fish passage facilities at the design stage of the Rock Island second powerhouse in 1974. Since FERC refused that request then, it is proving more difficult to fit fish passage onto a dam not designed for it.

[15]The power first/fish last history of the Columbia River led directly to the passage of the fish and wildlife protections contained in the Pacific Northwest Electric Power Planning and Conservation Act. 16 U.S.C. §§ 839 et seq. According to the General Accounting Office in a report commissioned by the

(Continued on following page)

In sum, this Court need not grant certiorari to review theoretical questions not decided by the Ninth Circuit. Nor should it accept this case to consider the court of appeals' well-founded conclusions about the meaning of the FPA, conclusions that are not, in any case, challenged by the petitioners.

(Continued from previous page)

House Commerce Committee, "while several factors have contributed to the decline of the [Columbia River] fish runs, a major problem is failure to adequately mitigate the adverse effects of dams constructed and operated by federal agencies and electric utilities." Testimony of Douglas L. McCullough, Hearings before Subcommittee on Energy and Power, House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978) at 177-178 (hereinafter Northwest Power Act Hearings). That failure had many causes. Among other things, fish and wildlife needs often were neither fully assessed nor measures to meet them implemented prior to the commencement of power operations. Instead, power operations were begun with no more than promises to study the needs of fish and wildlife in the future and recommend necessary measures. Such recommendations often were not made or, if made, not implemented. Northwest Power Act Hearings at 840.

The problem was put in terms of a remedy by Mr. Kenneth Higgs, of the U.S. Fish and Wildlife Service. He recommended that one of the critical factors in protecting and enhancing fish and wildlife in the Columbia River was to "assure that adequate fish and wildlife planning and operations go forth *at the same time* as power construction." Hearings at 840. (emphasis supplied) The Corps of Engineers had regularly made glowing promises about its determination to study the needs of fisheries and incorporate the best possible fish protection measures on its dams *after* they were constructed. *See*, Blum, "Hydropower v. Salmon: The Struggle of the Pacific Northwest Anadromous Fish Resources for Peaceful Coexistence with the Federal Columbia River Power System," 11 Envtl. L. 212, 236-237 (1981). Projects licensed by the Commission also regularly contained "reopener" clauses requiring the implementation of additional fish protection measures as they were developed. The condition of the salmon resources, however, vividly demonstrates that the performance of these promises "must be judged an abject failure." *Id.* The regulatory history of the Rock Island Dam tracks directly this pattern of power first/fish last.

II. The Court Of Appeals Correctly Found That The National Environmental Policy Act (NEPA) Requires Preparation Of An Environmental Impact Statement Prior To Relicense Of A Hydropower Project That Significantly Affects The Quality Of The Human Environment.

The relicense of a hydropower project, that is, the grant of a new license, commits a public resource — a navigable stream — to a particular use for up to fifty years. As when making any initial license decision, the Commission must take a fresh, comprehensive look at the proposed project and its operation, must study its impacts, and conconsider possible alternatives to the operation proposed by the applicant. 16 U.S.C. § 808, *Udall v. FPC*, 387 U.S. 428 (1967), *Scenic Hudson, supra. See,* discussion, *supra.* Such a review is exactly the sort of analysis for which the environmental impact statement (EIS) process of NEPA is designed.

Congress directed that NEPA's policies, including the EIS requirement, should be implemented "to the fullest extent possible." 42 U.S.C. § 4332(1). An agency must comply with NEPA unless some "existing law applicable to such agency's operations expressly prohibits or makes full compliance . . . impossible . . . ." 115 Cong. Rec. 39703 (1969) (statement of House Conferees), quoted in *Flint Ridge Development Co. v. Scenic Rivers Association,* 426 U.S. 776, 787-788 (1976). Here, the two statutory schemes — the FPA and NEPA — mesh perfectly. The FPA requires a comprehensive look before granting a relicense. NEPA sets out a mechanism to help accomplish such a review. Given that fit, the court of appeals properly concluded that prior to committing the public water resources of the Columbia River to hydropower production at the Rock Island Dam for an additional forty years, the Commission should have prepared an EIS.

Chelan and FERC would have this Court overturn the Ninth Circuit determination that an EIS is required because relicensing Rock Island Dam merely continues the "status quo." Crudely put: the dam has long killed fish and otherwise significantly altered the natural attributes of the Columbia River. Since it will continue to kill fish and significantly alter the Columbia River under the new license, Chelan and FERC say that no EIS is necessary. They argue this even though under possible alternative operations that should have been reviewed by FERC as part of its FPA licensing process, the dam's impact could have been made lesser than the status quo.[16]

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[16]FERC makes the wholly unsupported argument that the court of appeals imposes an "automatic [EIS] rule" for all relicensing decisions. That simply misreads the court of appeals' opinion. The court of appeals' opinion required an EIS when a project that "significantly affects the environment" seeks a new license. Pet. App. 18a-19a. The court of appeals opinion obviously did not repeal, indeed it relied upon, NEPA's language that requires an EIS only if the project "significantly affects the quality of the human environment." 42 U.S.C. § 4332 (2) (c).

Both the Commission and Chelan also urge this Court to overrule the Ninth Circuit because preparing EIS's would impose a "staggering burden" on the Commission. This Court, of course, will not rewrite statutory directives simply because an agency complains of the difficulty of complying with the law. Cf, *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978). In any case, since FERC is obligated even under the FPA to perform an analysis similar to that required by NEPA, *Scenic Hudson Preservation Conference, supra,* incorporating the NEPA procedures should impose no great additional work. Of course, for the Rock Island relicensing, the Commission did not perform the required analysis of impacts and alternatives pursuant to the FPA, let alone that directed by NEPA.

FERC's further assertion that preparing EIS's in order carefully to assess the consequences of its actions would have no "correlative benefit to the environment," FERC Brief at 9, represents an arrogant denial by the Commission of the fundamental Congressional goal in passing NEPA—to improve environmental protection by improving environmental analysis. It is thus unworthy of serious response.

To further their argument, Chelan and FERC cite cases from the Ninth Circuit and other courts that have permitted actions to proceed without an EIS when the environmental status quo remained unchanged. There is no conflict, however, between those cases and the court of appeals' ruling here. None of these cases involved dam relicensing and none, more importantly, involved a situation where, as here, the government agency involved had an independent statutory duty fully to reevaluate the wisdom of a pre-NEPA project and analyze a complete range of alternatives to its continued "status quo" operation. In *San Francisco Tomorrow v. Romney,* 472 F.2d 1021, 1024 (9th Cir. 1973), for instance, the court reviewed an action that had commenced prior to passage of NEPA. It concluded that the critical agency decisions were all "pre-NEPA" determinations and were not, therefore, subject to further review pursuant to that statute. The steps specifically challenged were considered mere implementation of the previous decision. In this case, by contrast, the major federal action occurred in 1982, long after NEPA's passage. The issuance of the new license in that year did not constitute the continuing implementation of a decision to license Rock Island Dam in 1930. It was, instead, an entirely new decision on whether, and how, the dam would operate for 40 more years.

In *Sierra Club v. Hassell,* 636 F.2d 1095 (5th Cir. 1981), the court did not require an EIS for reconstruction of a bridge destroyed by storms. But, in that case, too, there was no separate requirement that the Federal Highway Administration perform a comprehensive reevaluation when replacing the bridge. Here, FERC cannot evade its responsibility to perform a reevaluation of Rock Island Dam under the FPA.

The situation was similar in *San Francisco v. United States*, 615 F.2d 498, 501 (9th Cir. 1980) (no separate statutory requirement that the Navy fully reconsider the use of a 30 year-old shipyard). In that case, the court of appeals concluded that the lease of the shipyard was "a phase in an essentially continuing activity . . . [and] the Navy [need not conduct itself] as if [it] were establish-[ing] . . . the facility for the first time." *Id.* 615 F.2d at 501. Under the FPA, however, relicensing the Rock Island project cannot be treated as "an essentially continuing activity, "for to do so would violate the obligation to re-evaluate fully the wisdom and conditions of power operations. Relicensing cannot, therefore, be exempted from NEPA review procedures.[17] The court of appeals properly treated this case as significantly different from the so-called "status-quo" cases relied upon by Chelan and FERC. There is, therefore, no conflict among the circuits and no error in the Ninth Circuit's analysis.

FERC and Chelan also criticize the court of appeals for discussing the alternative of a nonpower license to support its call for an EIS. The court discussed that alter-

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[17]Two other cases cited by Chelan are similarly inapposite. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-117 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 915 (1980). It is also worthy of note that in both *San Francisco, supra*, 615 F.2d at 501 and *Hassell, supra*, 636 F.2d at 1099, the courts were strongly influenced by the fact that, even without preparing an EIS, the agencies gave extensive consideration to environmental factors, and assessed alternatives to the status quo, before proceeding with the projects. FERC's environmental analysis of the Rock Island project, in contrast, consisted of less than one page of unsupported conclusions and no serious review of alternatives.

native, and the federal takeover option which is not directly applicable here because of Chelan's status as a municipality, 16 U.S.C. § 828, merely to illustrate the breadth of review required by the FPA at relicensing. FERC's and Chelan's arguments that the nonpower license represents an unreasonable alternative at Rock Island are, however, simply irrelevant and premature. Once FERC begins "scoping" the Rock Island EIS, 40 C.F.R. § 1501.7, it can be determined whether the nonpower option should be further evaluated. No matter what conclusion may be reached through that administrative process, neither FERC nor Chelan deny, nor can they deny, that the FPA requires consideration of a full range of alternatives to a proposed license, as well as an analysis of those alternatives' environmental impacts. *Udall v. FPC, supra. Scenic Hudson Preservation, supra.* Nor can they deny that NEPA envisions a similar assessment. Whether one of the studied alternatives should be a nonpower license remains to be determined.[18]

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[18]There are a whole series of alternatives for operation of the Rock Island Dam different from its current operations and short of transforming the dam into a nonpower facility. FERC considered none of them. FERC's lengthy argument, however, that a nonpower license is not appropriate in this case and, evidently, in the Commission's view, in any case, is highly disturbing. To discount a Congressional authorization to the Commission to consider nonpower licenses as "nothing more than [of] historic interest" reflects an arrogant disregard of statutory language. And to argue, even before it has had an evidentiary hearing on the issue, or prepared an EIS, that a nonpower license at the Rock Island project is not "a viable alternative," FERC Brief at 14, or that it is "a most extreme and unjustifiable [step]", Chelan Brief at 15, represents a prejudgment of the very sorts of issues that both the FPA and NEPA contemplate will be decided only after careful review.

Finally, FERC suggests that the Ninth Circuit has required it to create in an EIS "frivolous boilerplate" and that contemplating the environmental impact of the continued power production at the Rock Island Dam is merely "an abstract exercise." FERC Brief at 15-16. This argument seems to reflect the Commission's determination that no matter what analysis it performs, it will issue an identical license. But the fact that the Commission foreclosed all other options, and has refused to consider any alternatives to the continued operations of the Rock Island Dam under current license conditions, does not make the court of appeals' direction meaningless. To the contrary, the court of appeals enjoins FERC to do what it did not do, what it evidently still resists doing, and what both the FPA and NEPA require: to look afresh at operations at the Rock Island Dam, consider alternatives to its continued operation under current conditions, and weigh impacts of the range of alternatives it selects. There is nothing frivolous about that exercise, unless FERC undertakes it with a closed mind.

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CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully sbmitted,

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